PACIFICORP, dba PACIFICORP ELECTRIC OPERATIONS,
UTAH POWER & LIGHT CO., AND ENERGY WEST MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 92-467 Decided September 26, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child affirming issuance of Notice of Violation No. 91-02-246-1 for failure to obtain prior written approval before the transfer, assignment, or sale of rights granted by a mining permit. Hearings Division Docket No. DV-91-5-R.

Reversed; notice of violation vacated.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

   In the 1988 final rulemaking revising the 10-day notice procedure, the Department clearly rejected the contention that when a violation exists, the only appropriate action by the state regulatory authority in response to such a notice is enforcement action. The Department recognized that other action, which would cause the violation to be corrected and was authorized by the state program, could be utilized by the state regulatory authority, unless it were arbitrary, capricious, or an abuse of discretion.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Transfer, Assignment, or Sale of Rights--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

   The failure of a state regulatory authority to issue a notice of violation in response to a 10-day notice alleging a violation relating to transfer of a permit will not be considered arbitrary, capricious, or an abuse of discretion when the state regulatory authority informs OSM that a permit transfer application, filed prior to the issuance of the 10-day notice, was being timely processed by the state regulatory authority.

APPEARANCES: Denise A. Dragoo, Esq., Salt Lake City, Utah, for appellants; Brock R. Wood, Esq., Office of the Solicitor, U.S. Department of the Interior, Division of Surface Mining, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

PacifiCorp, Utah Power & Light Company (UP&L), and Energy West Mining Company (Energy West) have appealed from a March 27, 1992, decision of Administrative Law Judge Ramon M. Child affirming issuance of Notice of Violation (NOV) No. 91-02-246-1 by the Office of Surface Mining Reclamation and Enforcement (OSM) to UP&L, as permittee of the Deer Creek Mine (permit No. ACT/015/018), and vacating the issuance of that NOV as to Energy West, as operator of the permit. The NOV charged a failure to "obtain prior written approval," in accordance with Utah Administrative Regulation 614-303-300 (1991), "before transferring, assigning or sale of rights granted by a permit." On appeal, no exception is taken to Judge Child's ruling regarding Energy West.

Procedural and Factual Background

Following issuance of the NOV, PacifiCorp, d.b.a. PacifiCorp Electric Operations (PEO), UP&L, and Energy West sought review of the NOV before the Hearings Division, Office of Hearings and Appeals. Judge Child, who was assigned to the case, did not conduct a hearing. Instead, the parties submitted the case to him based on a "Stipulation of Undisputed Facts," dated December 5, 1991 (Stipulation), and briefs. 1/ Those stipulated facts are as follows:

1. On February 7, 1986, the Division issued permit No. ACT/015/018 to UP&L to operate a coal mine known as the Deer Creek Mine in Emery County, Utah. Permit No. ACT/015/018 was issued to UP&L, Mining Division, as operator.

2. On January 9, 1989, UP&L, a Utah Corporation, merged with PacifiCorp, a Maine Corporation, forming PC/UP&L Merging Corporation, an Oregon corporation. On January 9, 1989, the name, PC/UP&L Merging Corporation, was changed to PacifiCorp, an Oregon corporation (PacifiCorp). PacifiCorp does business in the State of Utah as "PacifiCorp Electric Operations" and as "Utah Power & Light Company."

3. From 1986 until October 1, 1990, Deer Creek Mine permit No. ACT/015/018 was operated by UP&L, Mining Division.

4. By letter dated October 8, 1990, PEO, as successor to UP&L, submitted to the Division a 5-year renewal application for the Deer Creek

1/ The State of Utah, Department of Natural Resources, Division of Oil, Gas and Mining (the Division), participated as an intervenor below, signing the stipulation. It has made no appearance on appeal.

Mine permit No. ACT/015/018 stating that as of October 1, 1990, Energy West replaced UP&L, Mining Division, as operator of the Deer Creek Mine.

5. By letter dated October 12, 1990, PacifiCorp notified the Division that, effective October 1, 1990, the operator of the Deer Creek Mine had changed to Energy West, a Utah corporation and wholly-owned subsidiary of PacifiCorp.

6. By letter dated October 29, 1990, the Division notified PacifiCorp that the

> current approved permits for the [Des-Bee-Dove Mines, the Cottonwood/Wilberg Mine, and the Deer Creek Mine] state that the applicant is Utah Power & Light Co. The five year renewal applications for the Des-Bee-Dove Mine and the Deer Creek Mine state that the permit applicant is PacifiCorp. * * * [T]he transfer requirement, according to R614-303-300, must be submitted by November 13, 1990.

7. By letter dated November 26, 1990, the Division acknowledged receipt of PacifiCorp's permit transfer application submitted November 20, 1990, and requested that further information be provided by December 7, 1990.

8. By letter dated November 28, 1990, the Division requested a change in the Deer Creek Mine permit reclamation bond to PEO by December 14, 1990.

9. On November 30, 1990, the Division received Ten-Day Notice No. X-90-02-244-06 TV1 ("TDN") from OSM's Albuquerque Field Office ("OSM-AFO") concerning the change in ownership of the Deer Creek Mine. The TDN requested that the Division take enforcement action against applicant for "failure to obtain prior written approval in accordance with R614-303-300 before transferring, assigning or sale of rights granted by permit."

10. By letter dated December 7, 1990, the Division informed OSM-AFO that PacifiCorp had an application for permit transfer pending. The Division requested that the TDN be withdrawn.

11. By letter dated December 20, 1990, OSM-AFO refused the Division's request to withdraw the TDN, finding that the Division's response to the TDN was arbitrary and capricious.

12. By letter dated December 27, 1990, the Division requested informal review of the TDN from OSM's Deputy Director, Operations and Technical Services ("Deputy Director") and indicated it would forward additional material for review by January 7, 1991.

13. By letter dated January 7, 1991, the Division submitted the additional material and again requested that OSM withdraw the TDN.

14. By letter dated January 14, 1991, the Deputy Director responded to the Division's request for informal review by affirming the decision of

OSM-AFO. The Deputy Director ordered a Federal inspection of the Deer Creek Mine.

15. On January 25, 1991, a Federal inspection of the Deer Creek Mine was conducted.

16. On January 29, 1991, pursuant to the inspection of January 25, 1991, OSM issued Notice of Violation No. 91-02-246-1 ("NOV") to UP&L, as permittee, and to Energy West, as operator, of the Deer Creek Mine for failure "to obtain prior written approval in accordance with R614-303-300 before transferring, assigning or sale of rights granted by a permit." The specific abatement action required UP&L to submit to the Division an application for transfer of rights under a permit and to receive the Division's approval by April 25, 1991.

17. By letter dated February 4, 1991, the Deputy Director informed the Division that an NOV had been issued pursuant to the Federal inspection of January 25, 1991.

18. On February 15, 1991, the Division approved the transfer of the rights granted under permit No. ACT/015/018 from UP&L to PEO.

Administrative Law Judge's Decision

In his decision, Judge Child identified five issues for resolution, one of which concerned the liability of Energy West for the alleged violation. As indicated above, Judge Child's ruling regarding Energy West has not been challenged on appeal. The other four issues, and his resolution of them, follow.

Judge Child first discussed whether OSM's issuance of the NOV was barred by the 2-year statute of limitation found at Utah Code Ann.
§ 40-8-9(2). He concluded that it was not. He then posed the following questions as issue two: "Is the appropriateness of the Division's determination not to issue a notice of violation at issue? If so, did OSM properly decide that the Division's determination was arbitrary and capricious?" (Decision at 7).

He stated that the appropriateness of the Division's determination that "no violation of the State program occurred is at issue and OSM properly decided that the Division's determination was arbitrary and capricious" (Decision at 14). 2/

2/ Judge Child also stated, regarding issue two:

"Only after a ten-day notice is issued does the question of whether [the Division] took "appropriate action" come into play. See 30 CFR 842.11. The question bears on the validity of the process by which the NOV was issued and not on the validity of the TDN.

"However, in this case, the question of whether [the Division's] determination not to issue a notice of violation constituted "appropriate action" 131 IBLA 20

The third issue Judge Child proposed was--did PacifiCorp or UP&L comply with the State program? He concluded that both had failed to comply. Finally, he addressed the question whether the NOV should be vacated with respect to PEO because of an alleged failure to name PEO in the NOV or serve PEO with the NOV. He concluded that there was no reason to do so because PEO was just one of the names under which, following the merger, PacifiCorp conducted business in Utah.

Appellants' Contentions on Appeal

On appeal, appellants assert that Judge Child erred in his rulings on three of the issues. They contend that he incorrectly concluded that the statute of limitations found at Utah Code Ann. § 40-8-9(2) did not bar OSM's issuance of the NOV. They allege that he improperly concluded that PacifiCorp and UP&L violated the State program, arguing that no violation occurred because the parties lacked the capacity to transfer the permit absent approval of the regulatory authority and that prior approval is unavailable because the conditions necessary to obtain approval cannot be satisfied until closing or consummation of the permit transfer. Finally, appellants argue that the State, in fact, took appropriate action in this case.

Discussion

We address appellants' last contention first, and because we find our ruling on that contention to be dispositive, we reverse Judge Child's decision regarding PacifiCorp and UP&L and vacate the NOV.

We will first review, in more detail, the factual background leading to the issuance of the NOV in this case, as disclosed in exhibits appended to the Stipulation. The November 30, 1990, TDN merely provided the Division with the permittee's name (UP&L), the permit number, and the alleged violation: "Failure to obtain prior written approval in accordance with R.614-303-300 before transferring, assigning or sale of rights granted by permit" (Stipulation, Exh. G). The TDN contained no further explanation of the alleged violation. In its December 7, 1990, response, the Division stated, following a quote of the violation cited in the TDN:

> The Division was notified by letter on October 16, 1990 that effective October 1, 1990, PacifiCorp will operate the * * * Deer Creek Mine * * *. A letter to Bart Hyita on October 29, 1990 requested a formal transfer from the previous permit applicant, Utah Power & Light Company. A transfer application was received on November 20, 1990.

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fn. 2 (continued)
amounts to a synonymous rephrasing of the question whether applicant violated the State program. Consequently, only the latter question is addressed herein."
(Decision at 7).

> A deficiency document was sent November 26, 1990 requesting more information for the permit transfer. An additional request was sent November 28, 1990 regarding the bonds being changed to PacifiCorp (see attached letters).
>
> Donna Griffin was notified in a telephone conversation with Pamela Grubaugh-Littig on November 20, 1990, that a formal transfer of the permits is currently underway.
>
> The Division contends that resolution of the permit transfer is being undertaken in a timely manner, and that action had been undertaken in advance of issuance of the TDN. Please withdraw this TDN.

(Stipulation, Exh. H).

On December 20, 1994, OSM refused to withdraw the TDN, finding the Division's response to be inappropriate. OSM explained that a violation existed because PacifiCorp failed to notify the Division of its intent to assume the permit rights and to secure approval prior to their sale, assignment, or transfer. OSM found that the Division "has failed to take appropriate action to cause the violation to be corrected or shown good cause for such failure." OSM considered the Division's failure to address the violation as "arbitrary and capricious action" (Stipulation, Exh. I).

We conclude that the Division's response to the TDN was not arbitrary, capricious, or an abuse of discretion. It was appropriate under the circumstances of this case and should have been accepted by OSM, and the TDN withdrawn. Our conclusion is based on an analysis of the applicable regulation, 30 CFR 842.11, relating to the TDN procedure, and the preamble to the 1988 final rulemaking promulgating that regulation.

[1] Under 30 CFR 842.11(b)(1)(ii)(B)(1), upon receipt by the state regulatory authority of a TDN, it must take appropriate action or show good cause for not taking action to cause the violation, if any, to be corrected and respond within 10 days. An action or response by the state regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so. 30 CFR 842.11(b)(1)(ii)(B)(2). The regulations define "appropriate action" to include "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 CFR 842.11(b)(1)(ii)(B)(3). The regulations also list five situations that will be considered "good cause" for a state regulatory authority to fail to take action to have the alleged violation corrected, including that the possible violation does not exist under the state program and that the regulatory authority requires a reasonable and specified amount of time to determine if a violation exists. 30 CFR 842.11(b)(1)(ii)(B)(4). The preamble to the 1988 final rulemaking states that it was not the Department's intention to be exhaustive regarding its definitions of "appropriate action" and "good cause," and that other

actions by the state regulatory authority or other situations would be judged under the standard of whether they were arbitrary, capricious, or an abuse of discretion under the state program. 53 FR 26734-35, 26740 (July 14, 1988).

That same preamble makes clear the flexibility the Department intended to offer to the states in addressing TDN's. The Department stated:

> Because of its experience with primacy over the past six years, [OSM] rejects the concept that appropriate action to cause a violation to be corrected can only include responses showing that at the time of the state response either the condition constituting the possible violation of the Act no longer exists or the state has issued an NOV or cessation order. Instead, [OSM] recognizes that situations vary and may, in some cases, either be so complex or otherwise allow other actions to resolve the situation.
>
> For example, "other action" to cause the violation to be corrected could include the initiation of the process to require a revision or modification to the operator's permit under 30 CFR 774.11(b) where the original permit contained a defect.

53 FR 26733 (July 14, 1988).

Thus, the Department rejected the contention that when a violation exists, only enforcement actions should be considered appropriate action, stating that "other action may be appropriate, if it is authorized by the state program and if it will cause the violation to be corrected." Id. The Department further explained:

> [T]he rule focuses on the goal of the Act itself--to see that violations are corrected. In doing so, the rule allows state discretion in how best to accomplish that goal--but only if those means are authorized under the state program. [OSM] is not permitting a "free bite", but is simply saying that the federal government will not substitute its judgment and second-guess the states on a case-by-case basis, unless the state action is arbitrary, capricious or an abuse of discretion. [Emphasis added.]

53 FR 26734 (July 14, 1988).

[2] In his decision, Judge Child made the following statement in recounting the facts in this case: "After the Division determined that no violation of the State program occurred, OSM decided that the Division's determination was arbitrary and capricious" (Decision at 2). We believe that this statement exhibits an incorrect reading of the Division's response. As set forth above, the Division did not state that no violation occurred; what it told OSM was that the situation was under control, PacifiCorp had filed for a permit transfer, and that action on that

transfer was progressing. It then respectfully requested withdrawal of the TDN. 3/

Under the circumstances, the Division's response was appropriate and was not arbitrary, capricious, or an abuse of discretion. The purpose of a TDN is to afford a primacy state with an opportunity to respond to notice from OSM that there is a possible violation before OSM takes action. A TDN is not an enforcement action; it is a "communication device" between OSM and the states. 53 FR 26742 (July 14, 1988). In the absence of an imminent danger or significant, imminent environmental harm, OSM is required to await a response from the state or the lapse of the 10-day period before acting. In its oversight role, OSM's interest is in correction of the violation or condition causing the violation. If the state can effect that result, or has effected that result, then the necessity for OSM to act no longer exists.

In this case, we need only compare the abatement action required by OSM in its NOV with the Division's response to the TDN to realize that the Division's response was not arbitrary, capricious, or an abuse of discretion. In its January 29, 1991, NOV, OSM required UP&L to

> [s]ubmit to Utah Division of Oil, Gas and Mining (DOGM) a complete and accurate application for transfer of the rights granted by permit ACT/015/018 from Utah Power and Light to Pacificorp (as permittee) and Energy West (as operator). Diligently pursue approval of the application and obtain the written approval of DOGM in accordance with UMC R614-303-300. Failure to conduct the corrective action will result in cessation of mining operations.

(Stipulation, Exh. M). OSM directed that the corrective actions be completed by April 25, 1991.

In its response to the TDN, the Division stated that a transfer application had been filed on November 20, 1990, prior to receipt of the TDN; that the Division had sent various follow-up letters to PacifiCorp, prior to receipt of the TDN, to ensure the filing of all necessary information; and that resolution of the permit transfer was progressing in a timely fashion. The Division approved the transfer on February 15, 1991.

Thus, at the time OSM issued its January 29, 1991, NOV, it was aware that a transfer application had been filed, that it was being diligently pursued by the Division, and that action thereon would soon be forthcoming.

3/ Admittedly, the Division subsequently took the position that no violation existed (see Stipulation, Exh. K; Petition to Intervene at 5, dated Mar. 21, 1991), but that position was based, in part, on a misunderstanding regarding the basis for the TDN, the Division believing that it related to the change in operatorship (Intervenor's Response to Respondent's Motion for Summary Judgment at 2, dated Jan. 21, 1992).

Although OSM required written approval by April 25, 1991, as noted above, the Division approved the transfer on February 15, 1991.

This case appears to present a perfect example of the type of varied circumstance that the Department contemplated might arise and for which it provided, by its July 14, 1988, final rulemaking, the states with authority to address with "other action," other than enforcement action, so long as that action was not arbitrary, capricious, or an abuse of discretion.

Because the State's response to the TDN was appropriate and was not arbitrary, capricious, or an abuse of discretion, OSM should not have issued the NOV. There is no evidence that issuance of the NOV speeded the approval of the transfer application, which is the abatement that OSM desired. In fact, it may have slowed that action by diverting the Division's resources.

We are aware that in a February 4, 1991, letter to the Director of the Division the OSM Deputy Director further explained OSM's position regarding the issuance of the NOV (Stipulation, Exh. N), and we appreciate OSM's concern that through permit transfers persons who may be responsible for past unabated violations may be attempting to conduct surface coal mining operations. However, that letter illustrates why OSM erred in this case. Two separate statements by the Deputy Director in that letter indicate that although, by regulation, the Department had provided for state flexibility in responding to possible violations, OSM considered enforcement action to be the only appropriate action. Thus, he stated:

> We maintain that under that rule [Utah Admin. R.614-303-310] and its counterpart at 30 CFR 774.17, your agency is required to take appropriate enforcement action in situations where an unapproved entity is found to be engaged in surface coal mining operations until such time as a transfer, assignment, or sale of permit rights has been approved by your agency. [Emphasis added.]

(Stipulation, Exh. N at 1). He further stated:

> However, it is the position of OSM and a requirement of the Utah program that wherever a person is found to be conducting surface coal mining operations without an approved permit transfer, a violation of the Act and its implementing regulatory program provisions must exist, and, therefore, that an enforcement action is required. [Emphasis added.]

Id.

An enforcement action was not required in this case because the Division had taken "other action" to cause the violation to be corrected and, under the circumstances, that action was appropriate. We find no necessity to address the other issues raised by appellants regarding the NOV, since, by this decision, we vacate it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's decision is reversed and the NOV is vacated.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

R. W. Mullen
Administrative Judge